H. H. Norbeck Esq
With the Author's Compliments

A

LEGAL ARGUMENT

ON THE

TOLERATION ACT.

BY A BARRISTER AT LAW,

OF LINCOLN'S INN.

[*Price 2s.*]

A

LEGAL ARGUMENT

ON THE

Statute,

1st *WILLIAM and MARY, Chapter* 18,

INTITULED,

"AN ACT FOR EXEMPTING THEIR MAJESTIES' PROTESTANT
"SUBJECTS, DISSENTING FROM THE CHURCH OF ENGLAND,
"FROM THE PENALTIES OF CERTAIN LAWS;"

COMMONLY CALLED

THE ACT OF TOLERATION.

BY A BARRISTER AT LAW,

OF LINCOLN'S INN.

LONDON:

PRINTED FOR J. BUTTERWORTH, FLEET STREET;
AND J. HATCHARD, PICCADILLY

1812.

W. HESELTINE, PRINTER,
Hand Court, Upper Thames Street, London.

A

LEGAL ARGUMENT,

&c. &c.

IN the numerous discussions on the Toleration Act, to which recent events have naturally given birth, the author of the following pages has perceived, or thought that he has perceived, that in several quarters, a very remarkable degree of misapprehension has prevailed with respect to that important measure. And after making every allowance for the prejudices that have generally involved any question connected with religious differences, and for the mistakes which the heat of party never fails to engender, he believes, that even candid and learned persons have fallen into considerable errors, as to the true construction and legal effect of a Statute, which seems only to require a calm consideration, in order to be rightly understood. It has therefore occurred to him, that it may not be deemed either an useless, or an unseasonable task, at this particular crisis, to attempt a plain exposition of such of its enactments, as are applicable to the great body of Protestant Dissenters of this country, and a

short statement of the consequences which it produced on their situation, with reference to previously existing laws. The most prominent of those laws will therefore be enumerated; the Act of Toleration itself will be made the subject of a short commentary; the effect as well as the admissibility of that construction, which the author has been led to think erroneous, will be considered; and some observations will be offered on the subsequent Statutes which have been applied to the same subject.

As the present Tract professes to be a mere legal argument, every thing like theological controversy, or political disquisition, will be cautiously avoided: and as the practical operation of the measure in question on the present state of the Protestant Dissenters, is alone intended to be reviewed, no notice will be taken either of those ancient laws by which Roman Catholics, considered as such, and not in the general character of Nonconformists, were treated as criminals; nor of many severe provisions in restraint of Sectaries, to which the necessity, or violence, of the reign of Charles the Second gave a short-lived existence.

The Statute, commonly called the Toleration Act, the 18th chapter in the reign of William and Mary, was among the first general laws that received the Royal Assent, after the Revolution in 1688. Its object, as it affected individuals, was twofold:

I. To relieve great numbers of His Majesty's

subjects from penalties, to which they had been previously exposed.

II. To confer on a much more limited class certain privileges and immunities.

The penalties, from which relief was afforded, were created by several laws, of which a slight sketch, but sufficient for the present purpose, is subjoined.

By the Act of Uniformity, passed in the first year of the reign of Queen Elizabeth, it was enacted, "That all persons, having no reasonable or lawful excuse to be absent, should endeavour themselves to resort to their parish church or chapel accustomed, or, upon reasonable let thereof, to some usual place, where the Common Prayer is used, and there abide during the time of service; upon pain of ecclesiastical censure, and also upon pain of forfeiting for every such offence, twelve pence." This penalty was raised by another Statute of the twenty fourth year of the same reign, to £20. for a month's absence; and every person so offending for twelve months together, was to be bound to the good behaviour with two sufficient sureties in the sum of £200. and so continue bound until he shall conform.

Various new provisions for rendering these enactments more effectual were introduced into a law, passed in the twenty-ninth year of the same reign; and the severity of the punishment was considerably aggravated in the third year of James the First, when the King was authorised to refuse the monthly penalty of £20. though tendered, and

in lieu thereof, "to seize and take to his own use two-thirds of all the lands, tenements, and hereditaments, leases and farms," that belong to such offenders. In the same year, other penalties were imposed by another Statute, on persons absenting themselves from Divine Service, who at that time had obtained the name of Recusants.

These punishments are inflicted by the law of England for mere Nonconformity, evinced by absence from Public Worship, in the Established Church. A greater degree of severity is exercised towards those who may attend or harbour the unlawful assemblies in which doctrines condemned by the Established Church are taught. Against this species of offence, the twenty-second of Charles, chapter the first, frequently termed the *Conventicle Act*, was particularly directed.

By the first and second sections of that act, every subject of this realm, above the age of sixteen, being present at any assembly, conventicle, or meeting, under color or pretence of any exercise of religion, in other manner than according to the Liturgy and practice of the Church of England, which assembly should consist of five or more persons, besides those of the same household, if it be in a house where there is a family inhabiting, shall forfeit 5*s*. for the first offence, and 10*s*. for every subsequent offence. And this remarkable provision is superadded: That in

case of the *poverty of such offender*, the fine may be levied on the goods and chattels of *any other* person or persons who shall then be convicted of the like offence at the same conventicle, at the discretion of the justice, so as the whole sum to be levied on any one person in case of the poverty of other offenders, do not exceed ten pounds on occasion of any one meeting.

It was also thereby enacted (§ 4 and 5) that every person wittingly and willingly *suffering* any such conventicle to be held in his or her house or premises, shall forfeit £20; with the like power of fining other persons being present, in case of the poverty or inability of the principal offender, and with the like limitation of such auxiliary fine to the sum of £10.

A power is likewise given (§ 9.) to a single justice, or to a constable by warrant from a single justice, with what aid, force, and assistance they shall think fit, after refusal or denial to enter, to break open and enter any house or other place, where they shall be informed any such conventicle is held, and take into custody the persons there unlawfully assembled, to be proceeded against; and all lieutenants, deputy lieutenants, and commissioned officers of the militia are authorised and required, in case of necessity, to disperse such unlawful assemblies with troops or companies of horse or foot, &c.

The thirteenth section enjoins "That *that* act and all the clauses therein shall be construed most

largely and *beneficially* for the *suppressing of conventicles*, and for the justification and encouragement of all persons to be employed in the execution thereof:" no proceedings under it are to be quashed for defect of form; and offenders against it, quitting the jurisdiction, where their offences have been committed, are equally amenable to any other jurisdiction, under which they may afterwards be discovered.

The penalties inflicted on dissenting *teachers*, besides those to which their nonconformity alone renders them liable, are to be found principally in the Act of Uniformity passed in the reign of King Charles the Second, in the second year after his restoration (13 and 14 Car. 2. c. 4.) in the Conventicle Act above mentioned, and in an Act passed in the 17th year of the same reign, commonly known by the designation of the *Five Mile Act*,* which, though it professes in its title to be directed to the restraint of nonconformists in general, does in truth, in its preamble and enactments, affect none but ministers.

By the first of these statutes, (§ 3, 4, 5.) every minister refusing or neglecting within a certain time to declare his unfeigned assent and consent to all things contained in the book of Common Prayer, in the form to which it had then recently been altered, and in which it now continues, was *ipso facto* deprived of all his spiritual promotions, which the patron was authorised to fill up in like manner as if such minister were actually dead.

* Called also, in one or two cases, "The Oxford Act."

By § 14, No person can be *admitted* to any ecclesiastical promotion, nor shall presume to consecrate or administer the Sacrament of the Lord's Supper, without episcopal ordination, under pain of forfeiting one hundred pounds for every such offence.

Any lecturer, (§ 19. 21.) preaching a sermon or lecture, without having been licensed by the bishop of the diocese or the archbishop of the province, or without having read the thirty-nine articles and declared his unfeigned assent to the same, or without reading the Common Prayer and the service of the Church of England on one Sunday in every month while he holds the lectureship, is disabled from ever preaching again till he should conform, and is liable to three months imprisonment without bail or mainprize for every lecture or sermon he may preach, while so disabled.

§ 24. By the same Act of Parliament "the several good laws and statutes of this realm," formerly made and then in force "for the uniformity of prayer and administration of the public sacraments," were declared to stand in full force and strength, and were applied to the form of Common Prayer, according to the alterations which it had then recently undergone.

By the *Five Mile Act* (17 Car. 2. c. 2.) "All parsons, vicars, curates, lecturers, and other *persons in Holy Orders, or pretended Holy Orders, or pretending to Holy Orders*," who had not then

complied with the conditions of the Act of Uniformity, and who should not take the oath of non-resistance, and all such persons as shall take upon them to preach in any unlawful assembly, conventicle, or meeting, under color or pretence of any exercise of religion, contrary to law, shall not, (except in passing on the road) come or be within five miles of any city, town corporate, or borough sending members to Parliament, on pain of forfeiting £40 for every such offence.

§ 4. Every person so restrained, and not frequenting divine service according to the Church of England, is also disabled under the same penalty, from teaching any public or private school, or taking any boarder instructed by himself or herself.

The third clause of the Conventicle Act, which particularly applies to the case of Dissenting Ministers, imposes a penalty of £20 for the first offence, and of £40 for every subsequent offence, upon any person who shall take upon him to preach or teach in any meeting, assembly, or conventicle, under color or pretence of any exercise of religion, in other manner than according to the Liturgy and practice of the Church of England.

Such were the leading provisions of the law with respect to Protestant Dissenters, as it existed at the time of the Revolution in 1688, and as it exists at this day. None of these statutes are repealed, except in some few particulars of

very subordinate importance: and, though during many years past, a general indisposition to enforce them appears to have prevailed; it should be remembered that every individual magistrate in England and Wales is not only authorised, but required to carry them into effect, in all cases to which they are applicable, on being *informed* of the offences at which they are pointed, and that a considerable portion of the penalty incurred, may at the discretion of such magistrate, be given as a reward to the informer. It has been sufficiently demonstrated that the temper of the times may change: the severe, though dormant enactments of the laws in question were well compared by a reverend Prelate* to scattered weapons lying loose upon the ground, which the fiend of persecution may at any time catch up and employ to a deadly purpose. That they are still susceptible of being so employed, is apparent from the decision of the Court of King's Bench, in Peak's case, (2 Salk. 572); from the case of the king against Samuel Hall, 1st Term Rep. 320, where the defendant was convicted in the penalty of £20 for permitting an assembly of Dissenters to exercise their religious worship in his dwelling house; and when his conviction was removed by *certiorari*, the Court of King's Bench said, that however inclined they were to listen to any trivial objections to such a prosecution, yet none of the objections actually taken were suffi-

* Bishop Horseley, in Woodfall's Register, June 10, 1789.

cient in point of law, and therefore the conviction was affirmed.

But notwithstanding these examples, the penal laws against nonconformists have so long been practically obsolete, that they had fallen into complete oblivion, and their very continuance was generally a subject of doubt. It is therefore, proper to state, that in Flintshire, several penalties, have within these few months, been imposed and levied under the Conventicle Act, on persons who by exercising acts of religion in Dissenting congregations, violated, without knowing that they were subject to, its provisions. The case of William Kent is of the same kind. Having been convicted of teaching, by a single magistrate, he appealed to the Quarter Sessions held in Berkshire, in January, 1811; and the form of trying his appeal seems to have been somewhat unusual. A jury was impannelled to try the fact, and he was found guilty. But a *certiorari* was afterwards obtained for removing the conviction into the Court of King's Bench, where it was quashed without opposition, in consequence of certain defects in point of form, which were found to be indefensible and irremediable.---A case which was tried at Portsmouth Sessions last summer, between two persons of the names of Norris and Maybee, but which was in fact a prosecution by the clergyman of the parish, against the Hon. George Grey, Commissioner of the Dock-yard, for instituting a Sunday School for the instruction of the apprentices

and young workmen in the Dock-yard, may also be quoted, to prove both that these laws are still in existence, and that there still are individuals well inclined to enforce them.

But these laws, though still unrepealed, certainly underwent very important modifications from the Toleration Act; and indeed, under the construction which that Act for a whole century, invariably received, they could only be applicable to a very small number of persons. The historians of that period, relate that King William was desirous of affording to the Dissenters a more enlarged and comprehensive indulgence; but the measure brought into Parliament for that purpose, though supported by the influence of the Court, was rejected by the House of Lords, where it originated. The Act of Toleration, however, effected a great deal, and has always been attributed to the pen of Lord Somers. Bishop Burnet says it passed easily, which is rendered also probable by the scantiness of the debates which it occasioned. He gives the following short account of its provisions. "It excused dissenters from all penalties, for their not coming to Church, and for going to their separate meetings. There was an exception of Socinians; but a provision was put in it in favor of Quakers: and though the rest were required to take the oaths to the government, * they were excused upon making in lieu

* This is a slight mistake; the oaths were required to be taken as well as the declaration made, by all but Quakers.

thereof, a solemn declaration. They were to take out warrants for the houses they met in: and the justices of the peace were required to grant them." This bill is entitled, "An Act for exempting their Majesties' Protestant subjects, dissenting from the Church of England, from the penalties of certain laws:" and the first section, adopting the principle which had been announced in King William's declaration before he sailed from Holland, simply recites, that "Some ease to scrupulous consciences in the exercise of religion may be an effectual means to unite their Majesties' Protestant subjects in interest and affection." The second section is in the following words: "That neither the statute made in the three and twentieth year of the reign of the late Queen Elizabeth, intituled *An Act to retain the Queen's Majesty's subjects in their due obedience;* nor the statute made in the twenty-ninth year of the said Queen, intituled *An Act for the more speedy and due execution of certain branches of the Statute made in the three and twentieth year of queen's Majesty's reign,* viz. the aforesaid Act; nor that branch or clause of a statute made in the first year of the reign of the said Queen intituled, *An Act for the uniformity of Common Prayer and service in the Church and administration of the Sacrament;* whereby all persons having no lawful or reasonable excuse to be absent, are required to resort to their parish church or chapel, or

some usual place where the Common Prayer shall be used, upon pain of punishment by the censures of the church, and also upon pain that every person so offending shall forfeit for every such offence twelve-pence; nor the Statute made in the third year of the reign of the late King James the First, intituled, *an Act for the better discovering and repressing Popish Recusants;* nor that other Statute made in the same year, intituled, *an Act to prevent and avoid dangers which may grow by Popish Rescuants;* nor any other law or statute of this realm made against Papists or Popish Recusants, except the Statute made in the five and twentieth year of King Charles the Second, intituled, *an Act for preventing dangers which may happen from Popish Recusants;*" (commonly called the Test Act) "and except also the Statute made in the thirtieth year of the said King Charles the Second, intituled *an Act for the more effectual preserving the King's person and government, by disabling Papists from sitting in either House of Parliament;* shall be construed to extend to any person or persons dissenting from the Chusch of England, that shall take the oaths mentioned in a Statute made in this Parliament, intituled, *An Act for removing and preventing all questions and disputes concerning the assembling and sitting of this present Parliament;* and shall make and subscribe the declaration mentioned in a Statute made in the thirtieth year of the reign of King Charles the Second, intituled

An Act to prevent Papists from sitting in either House of Parliament; which oath and declaration the Justice of Peace at the general Sessions of the Peace, to be held for the county or place, where such person shall live, are *hereby required to tender and administer to such persons,* as shall *offer* themselves to take, make, and subscribe the same, and thereof to keep a register; and likewise none of the persons aforesaid shall give or pay, as any fee or reward, to any officer or officers belonging to the Court aforesaid, above the sum of Sixpence, nor that more than once, for his or their entry of his taking the said oaths, and making and subscribing the said declaration; nor above the further sum of Sixpence for any certificate of the same, to be made out and signed by the officer or officers of the said Court."

The third section discharges from the penalties incurred by force of any of the aforesaid statutes, all persons already convicted, or prosecuted in order to conviction, upon any of them, that should take the said oaths and subscribe the said declaration. The fourth section exempts all persons taking the oaths and subscribing the declaration, from the pains, penalties, and forfeitures of the thirty-fifth of Queen Elizabeth, and the twenty-second of Charles the second, for suppressing seditious conventicles; "nor shall any of the said persons be prosecuted in any Ecclesiastical Court, by reason of their nonconforming to the Church of England."

The fifth section excludes from the benefit of the Act, all Dissenters attending any assembly for Religious Worship, where the doors are fastened: the sixth section preserves the right of the Church to tithes, and the seventh permits Dissenters, appointed to Parochial or Ward Offices, but scrupling to assume them on account of the oaths required, to officiate by Deputy.

The eighth section enacts, "That no person dissenting from the Church of England, in Holy Orders, or pretended Holy Orders, or pretending to Holy Orders, nor any preacher or teacher of any congregation of Dissenting Protestants, that shall make and subscribe the declaration aforesaid, and take the said oaths at the General or Quarter Sessions of the Peace, to be held for the county, town, parts, or division, where such person lives, *which Court is hereby empowered to administer the same;* and shall declare his approbation of, and subscribe the Articles of Religion, mentioned in the statute made in the thirteenth Year of the reign of the late Queen Elizabeth, except the thirty-fourth, thirty-fifth, thirty-sixth, and these words of the twentieth Article, viz. (*the Church hath power to decree Rites or Ceremonies, and authority in controversies of faith, and yet)* shall be liable to any of the pains or penalties mentioned in an Act made in the seventeenth year of the reign of King Charles the second, intituled "*An Act for restraining Nonconformists from inhabiting in Corporations;*" nor the penalties mentioned in

the aforesaid Act, made in the two and twentieth year of his said late Majesty's reign, for or by reason of such persons preaching at any Meeting for the exercise of Religion; nor to the Penalty of £100 mentioned in an Act made in the thirteenth and fourteenth of King Charles the second, intituled, *an Act for the uniformity of public prayers and administration of sacraments, and other rites and ceremonies, and for establishing the form of making, ordaining, and consecrating of Bishops, Priests and Deacons in the Church of England,* for officiating in any Congregation for the exercise of Religion permitted and allowed by this Act."

By the ninth section it is provided, "That the making and subscribing the said declaration, and the taking the said oaths, and making the declaration of approbation and subscription to the said Articles, in manner as aforesaid, by every respective person or persons herein-before mentioned, at such General or Quarter Sessions of the Peace as aforesaid, shall be then and there entered of record in the said Court, for which six pence shall be paid to the Clerk of the Peace and no more: Provided that such person shall not at any time preach in any place, but with the doors not locked, barred, or bolted as aforesaid."

The tenth section extends the indulgence to Baptist Ministers, subscribing the aforesaid Articles, with the exception of that part of the twenty-seventh Article, which relates to infant baptism, and complying in other respects with the provisions of the eighth section.

The eleventh section further enacts, that every teacher or preacher in Holy Orders, or pretended Holy Orders, *that is a minister, preacher, or teacher of a congregation*, that shall take the oaths herein required, and make and subscribe the declaration aforesaid, and also subscribe such of the aforesaid Articles of the Church of England, as are required by this Act in manner aforesaid, shall be thenceforth exempted from serving upon any jury, or from being chosen or appointed to bear the office of Churchwarden, Overseer of the Poor, or any other parochial or Ward office, or other office in any hundred of any shire, city, town, parish, division or wapentake."

By the twelfth section, every Justice of the Peace may require any person that goes to meeting, for the exercise of Religion, to subscribe the declaration, and take the oaths; and such person refusing to do so, is to be committed to prison without bail or mainprise, till the following Quarter Sessions, where, refusing upon a second tender, he shall suffer as a popish recusant convict.

The people called Quakers are alone affected by the thirteenth section.

It is provided by the fourteenth section, that no person who shall have refused as aforesaid shall be afterwards admitted to make and subscribe the declarations required from Quakers, unless he can produce two Protestants to testify upon oath that they believe him to be a Protestant Dissenter, or a certificate under the hand of four

Protestants, and also another certificate under the hands and seals of six or more sufficient men of the congregation to which he belongs, owning him for one of them: and the justice is directed by the fifteenth section, until compliance with these requisites, to bind him in the sum of fifty pounds to produce the same, and commit him to prison till he gives such security, or produces such evidence.

All the laws at that time in being for frequenting divine service on Sundays are, by the sixteenth section declared to continue in force, and required to be executed against all persons that offend against the said laws, except those who attend some congregation or assembly for religious worship, allowed or permitted by the Act in question. The seventeenth section pointedly disclaims all intention "to give any ease, benefit, or advantage, to any Papist, or Popish recusant whatsoever, or any person that shall deny in his preaching or writing, the doctrine of the Blessed Trinity, as it is declared in the aforesaid articles of religion,"

The eighteenth section provides, and enacts, "That if any person or persons at any time or times after the tenth day of June, do and shall willingly and of purpose, maliciously or contemptuously come into any Cathedral, or Parish-Church, Chapel, or other congregation permitted by this Act, and disquiet, or disturb the same, or misuse any preacher or teacher, such person or

persons upon proof thereof before any justice of peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal sum of fifty pounds, and in default of such sureties, shall be committed to prison, there to remain till the next general or Quarter-Sessions; and upon conviction of the said offence at the said General or Quarter-Sessions, shall suffer the pain and penalty of twenty-pounds, to the use of the King's and Queen's Majesties, their heirs and successors."

By the nineteenth section it is provided "that no congregation or assembly for religious worship, shall be permitted or allowed by this Act, until the place of such meeting shall be certified to the bishop of the diocese, or to the archdeacon of that archdeaconry, or to the justices of the peace at the general or Quarter-Sessions of the peace for the county, city, or place, in which such meeting shall be held, and registered in the said bishop's or archdeacon's court respectively, or recorded at the general or Quarter-Sessions; the register or clerk of the peace whereof respectively is hereby required to register the same, and to give certificate thereof to such person as shall demand the same, for which there shall be no greater fee nor reward taken, than the sum of six-pence."

Before offering any remarks on this Act of Parliament, it seems proper to lay the entire subject at once before the reader, by pursuing the history of those privileges which are granted by it, through

the several Statutes, by which they have been confirmed and extended subsequently to the reign of King William. The first of these, passed in the reign of Queen Anne, enacts and declares "That the Toleration granted to the Protestant Dissenters, by the Act made in the first year of the reign of King William and Queen Mary, intituled, *An Act for exempting their majesties' Protestant subjects, dissenting from the church of England, from the penalties of certain laws*, shall be and is hereby ratified and confirmed, and that the same act shall at all times be inviolably observed for the exempting of such Protestant Dissenters as are thereby intended, from the pains and penalties therein mentioned."

It is declared and enacted by the eighth section, That if any person dissenting from the Church of England (not in Holy Orders, or pretended Holy Orders, or pretending to Holy Orders, nor any teacher or preacher of any congregation) who would have been entitled to the benefit of the Toleration Act, if he had qualified according to its provisions, then was or should thereafter be prosecuted under any of the penal statutes, from which Protestant Dissenters are exempted by the said Act, shall take the oaths, &c. during prosecution, he shall be entitled to the benefit of that Act, and shall be thenceforth exempted and discharged from the penalties and forfeitures incurred by force of any of the aforesaid penal statutes. And the ninth section gives permission

to any teacher or preacher of any congregation of Dissenting Protestants, duly qualified according to the said Act in any one county, to officiate in any registered meeting in any other county.

An Act passed in the first year of King George the First; "for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters," (1. G. 1. St. 2. c. 5. § 4.) extends incidentally the protection of the law to bodies of Dissenters, by enacting, That if any persons unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully, and with force demolish or pull down or begin to demolish or pull down any church or chapel, or any building for religious worship, certified and registered according to the Statute made in the first year of the reign of the late King William and Queen Mary, intituled, an Act, for exempting their Majesties Protestant subjects, dissenting from the Church of England from the penalties of certain laws, that then every such demolishing, or pulling down, or beginning to demolish or pull down, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony without benefit of clergy.

The next law relating to this subject, passed in the nineteenth year of his present Majesty, professedly "for the further relief of Protestant Dissenting ministers and schoolmasters," — an

object in which those bodies of men had been defeated in the House of Lords a few years before,---at once extends the description of persons to be relieved, and confers new benefits upon them. The preamble of that act recites the conditions on which the Toleration was tendered to "persons dissenting from the Church of England, in Holy Orders, or pretended Holy Orders, or pretending to Holy Orders, and preachers or teachers of any congregation of Dissenting Protestants," and that "many such persons scruple to declare their approbation of, and to subscribe the articles of religion" required to be subscribed by the Toleration Act; and, "for giving ease to such scrupulous persons," enacts

"That every person dissenting from the Church of England, in Holy Orders, or pretended Holy Orders, or pretending to Holy Orders, being a teacher or preacher of any congregation of Dissenting Protestants, who, if he scruple to declare and subscribe as aforesaid, shall take the oaths, and make and subscribe the declaration against popery, required by the said Act, in the first year of the reign of King William and Queen Mary, to be taken, made, and subscribed by Protestant Dissenting ministers, and shall also make and subscribe a declaration in the words following; *videlicet*,

'*I. A. B.* do solemnly declare, in the presence of Almighty God, that I am a Christian and a Protestant, and as such, that I believe that the

'Scriptures of the Old and New Testament, as 'commonly received among Protestant Churches, 'do contain the revealed Will of God; and that 'I do receive the same as the Rule of my Doc-'trine and Practice.'

"Shall be, and every such person is hereby declared to be, intitled to all the exemptions, benefits, privileges, and advantages, granted to Protestant Dissenting ministers by the said Act, made in the first year of the reign of King William and Queen Mary; and by an Act, made in the tenth year of the reign of Queen Anne, intituled, *an Act for preserving the Protestant Religion, by better securing the Church of England, as by Law established; and for confirming the Toleration granted to Protestant Dissenters by an Act intituled 'an Act for exempting their Majesties' Protestant Subjects, dissenting from the Church of England, from the penalties of certain Laws;' and for supplying the defects thereof; and for the further securing the Protestant succession, by requiring the practisers of the law in North Britain to take the oaths and subscribe the declaration therein mentioned;* and the Justices of the Peace at the General Session of the Peace to be holden for the county or place where any Protestant Dissenting Minister shall live, are *hereby required* to tender and administer the said last-mentioned declaration to such minister, *upon his offering himself* to make and subscribe the same, and thereof to keep a regis-

ter; and such minister shall not give or pay, as a fee or reward to any officer or officers, belonging to the court aforesaid, above the sum of sixpence for his or their entry of such minister's making and subscribing the said last-mentioned declaration, and taking the oaths, and making and subscribing the declaration against Popery, required by the said Act, made in the first year of the reign of King William and Queen Mary, to be taken, made, and subscribed by Protestant Dissenting ministers; nor above the sum of sixpence for any certificate thereof to be made out and signed by the officer or officers' of the said court; *and every such person, qualifying himself as aforesaid, shall be exempted from serving in the militia of this kingdom;* and shall also be exempted from any imprisonment, or other punishment, by virtue of an Act, made in the thirteenth and fourteenth years of the reign of King Charles the Second, intitled, *an Act for the Uniformity of Public Prayers; and administration of Sacraments, and other rites and ceremonies; and for establishing the form of making, ordaining, and consecrating bishops, priests, and deacons, in the Church of England;* or by an Act made in the fifteenth year of the same reign, intituled, *an Act for relief of such persons as by sickness or other impediment, were disabled from subscribing the declaration in the Acts of Uniformity, and explanation of part of the said Act;* for preaching or officiating in any congregation

of Protestant Dissenters, for the exercise of religion permitted and allowed by law."

§. 2. "And be it further enacted, by the authority aforesaid, That no Dissenting Minister, nor any other Protestant dissenting from the Church of England, who shall take the aforesaid oaths, and make and subscribe the above-mentioned declaration against Popery, and the declaration herein before-mentioned, shall be prosecuted in any Court whatsoever, for teaching and instructing youth as a tutor or school-master; any Law or Statute to the contrary notwithstanding."

The exemption from serving in the militia, first introduced into this Statute, has been continued in all the subsequent militia acts; but the language employed on the occasion has, from time to time, undergone considerable variations, which ought to be specified. Thus, in the Act of the twenty-sixth of the present reign, "*for amending, and reducing into one Act of Parliament, the laws relating to the militia in that part of Great Britain called England,*" (26 G. 3. c. 107. §. 27.) "licensed teachers of any separate congregation," are enumerated in the catalogue of those, who shall not "be liable to serve personally, or to provide a substitute to serve in the militia;" where the reader will observe that the word "licensed," is for the first time employed, no licence being in fact required by any former law from dissenters of any kind, whether ministers or laymen; and the epithet "*separate,*" is likewise for the first time

employed, to qualify the privileges attached to teachers of congregations;—a word, on which so great a stress has been laid in recent discussions, that a full examination of its meaning and effect will form a part of the present argument, before it is drawn to a close.

The exemption of Dissenting Ministers from serving in the Supplementary Militia, (37 G. 3. c. 3. § 18.), is expressed in exactly the same terms.

In the forty-second of George the third, c. 90. § 43. (passed during the administration of Mr. Addington,) the phraseology applicable to this point, is materially different. The dissenting teachers thereby exempted from service in the militia are "teachers licensed within the county, riding, or place, to teach in some separate congregation, whose place of meeting shall have been duly registered within twelve months previous to the general meeting appointed to meet in October for the purpose of *that* Act." This description, which not only adopts the former error of assuming that teachers are *licensed*, but extends it to the supposition of their being licensed to teach "some separate congregation," appears also to leave it doubtful in *what* county, riding, or place, the imaginary licence was to have been granted; it may be observed too that the only possible construction, that the words can receive would have operated as a repeal of the Act of Queen Anne before recited; while the expression,

"*whose* place of meeting," might by implication confine the privilege to such ministers as were the single teachers, not merely of a particular congregation, but at a definite place: not to mention that the registration required to be *within* twelve months of the October meeting, must obviously have been intended to be exactly the reverse, i. e. *not* within twelve months. Another law, enacted in the same year for the sole and express purpose of amending so much of the former Act "as relates to the exemption of licensed teachers of any separate congregation from serving in the militia," reciting with unquestionable accuracy that "great doubts had arisen as to the exemption," without repealing the ambiguous clause, or substituting another in its place, superadds in fact another exemption, which is conferred on "licensed teachers of any separate congregation, who shall have been licensed twelve months at the least previous to the yearly general meeting." The emendatory Act therefore, which intended only to transfer the necessity of a twelve months probation from the place to the person, left it in force with respect to both; made all dissenting ministers liable to serve personally in the militia, within the first year of their ministry; and preserved the original error with respect to *licences*.

Further amendments of the same law were carried into effect, in the same Session of Parliament, by the 43 G. 3. c. 96, which also enabled his Majesty more effectually and speedily to ex-

ercise his ancient and undoubted prerogative in requiring the military service of his liege subjects in case of invasion, but which exempted from military service under that act "any licensed teacher of any separate congregation, in holy orders, or pretended holy orders, and not carrying on any other trade, or exercising any other occupation for his livelihood, except that of a schoolmaster." And the dispensation from ballot for the Local Militia, (48 G. 3. c. 111. § 12.) is accorded, in the same terms, to the same class of persons, "so long only as they continue within any of the descriptions aforesaid."

This head would appear to be left imperfect, without the description of those exempted in the Local Militia Act, now passing through the legislature [12th March, 1812] it is thus expressed: "Nor any teacher or preacher in Holy Orders, or pretended Holy Orders, or pretending to Holy Orders, not carrying on any trade, or exercising any other occupation for his livelihood, except that of a schoolmaster, having taken the oaths, and made and subscribed the Declaration required by law from the teachers or preachers of congregations of Dissenting Protestants, and being *bonâ fidè* the teacher of any congregation whose place of meeting shall have been duly registered at least twelve months previous to the general meeting appointed to meet in October for the purposes of this Act." By the time

when this tract is made public, the privilege thus granted will, in all probability, be a part of the law of the land.

But it is time to return to the Toleration Act, of which the second and third clauses are couched in language too clear and forcible, to admit of the smallest doubt as to the construction which they ought to undergo. They relieve the nonconformists, or recusants, from all the penalties attached to mere nonconformity, on condition of their taking certain oaths, and subscribing a certain declaration; and they *require* the Court of Quarter Sessions to administer these oaths and this declaration, not to Dissenters as such, but to all persons who shall tender themselves for the purpose of taking and subscribing them. In such language it seems impossible for ingenuity itself to detect the slightest particle of ambiguity; not even the doubts that have been lately extorted from other portions of the same law, which had remained unquestioned and undisturbed for more than a century, would authorise our hesitating for a moment to believe that the crime of nonconformity alone may be effectually purged by the offender's taking the oaths, and subscribing the declaration required by the second section of the Toleration Act.

We pass to the eighth section. And the present is perhaps the best occasion for remarking as a peculiar circumstance attending a law of so

important a character, and of such extensive operation, how very few judicial decisions have ever been pronounced upon it. This remark might be thought of some importance, in illustration of the present argument, as tending to prove that its construction of this Act has uniformly been favorable to the wishes of the Dissenters, for whose express relief it was passed, and who have never been suspected of acquiescing too readily in any measure, by which their rights as men or as Christians have been circumscribed: if then, they had been harassed by any claim of discretionary power, under the eighth clause (and there can be no doubt that there has constantly existed a strong and active disposition to keep them strictly within the limits prescribed by the laws, or by any prosecutions under the statutes which it conditionally suspended,) we may feel confident, not only that appeals, in every such instance, to the law would have been recorded, by our legal writers, but that history itself would have rung with the alarms and apprehensions of a very large proportion of his Majesty's subjects justly jealous of their privileges, and peculiarly enlightened with respect to them. But the necessity of resorting to inference on this subject is superseded by the plain fact established by the universal tradition of former times, and till within the last ten years, by the equally general practice of the present, that all magistrates have in all cases considered them-

selves bound to administer the oaths, the declation, and the thirty-six articles, or, in the case of baptist ministers the thirty-six, with the exception of part of the twenty-seventh, stated in the Toleration Act, or the oaths and declaration substituted for these by the nineteenth of George the Third, to every individual claiming to take and subscribe them in any of the characters enumerated in those several acts. If any ambiguity appears to exist in the wording of any law, it is not too great a compliment to the common sense of mankind, to presume that that interpretation is the true one, which has universally and uninterruptedly prevailed during a long course of years. And when, as in the present instance, such long continued usage must originally have been contemporary with the passing of the law in question, when it is necessarily of the most public nature, and yet proceeds without censure or regulation, we seem almost to arrive at a demonstration that the practice has been in strict conformity with the intention which prompted the legislature to frame the law.

In truth, the absence of all discretion in the magistrates as to this subject, while it has been uniformly deemed the great security of those who still contend for it, has been as constantly deplored and reprobated as a mischievous consequence of the Toleration Act, by that very class of persons which now denies that it ever had a legal existence; and it is a curious fact, that the

bill brought into the House of Lords last year by Lord Sidmouth, for abridging the privileges of Dissenters, was founded on the very supposition that those privileges existed to the extent, which it is now argued they never had obtained.

It is not clear whether four or five descriptions of persons are included in the eighth section; 1. Persons in Holy Orders; 2. Persons in pretended Holy Orders; 3. Persons pretending to Holy Orders; 4, 5. Teachers, or (and) preachers, of congregations. Of the three first classes a full, but not perhaps a perfectly satisfactory account is given in a sensible and candid Tract, published a few years ago by Mr. Smith,* a barrister, who deduces from the history of the times that the Dissenters in Holy Orders were persons educated in the Established Church, but afterwards converted to the Presbyterian or some other sectarian doctrines, and that those in pretended Holy Orders were such as had received ordination from the Presbyterian Synod, instituted by the two Houses of Parliament in the year 1645.† Now though it is certainly true that the persons

* P. 27—31.

† "Observations on the Statute of the 1 William and Mary, chap. 18, commonly called the Toleration Act, &c. by Joseph Smith, Barrister at Law." The date at the conclusion is, Bristol, Jan. 1, 1804.

alluded to by Mr. Smith fall expressly within the two first definitions, it by no means follows that either the Parliament of King William which took off these penalties, by the Toleration Act, or those of Charles the Second, which had imposed them and had introduced those descriptions into the Five-mile Act, intended to limit the operation of the respective Statutes to persons who happened to be in existence, at either of those epochs. They may well be supposed to have foreseen, what has constantly happened, that some divines, ordained in the Church of England would from time to time depart from her doctrines; and could hardly fail to know that several Dissenting Churches pretended to the power of conferring Holy Orders, of which, being without episcopal authority, the law of this country would not acknowledge the reality.

The third expression—pretending to Holy Orders—Mr. Smith * considers as *claiming* Holy Orders, or in other words claiming to exercise the office of ministers not in the Church of England, but according to the rites and usages of Protestant Dissenters. "This class (he says) must be considered as distinct from that of persons in Holy Orders, and also from that of persons in pretended Holy Orders, or we shall confound the distinction made by the Act; and if we recollect that none of the Protestant Dissenters then living could have been ordained under the ordinance

* P. 31.

of 1645, since the restoration of Charles the Second, and therefore, if ordained at all, must have received their ordination according to the forms of the different sects with which they were connected, it will be evident that, when the Toleration Act passed, this third class would be so numerous as to comprehend the far greater number of Protestant Dissenting Ministers.

"In this class, I think, may fairly be included such persons as were students for the Dissenting Ministry; for the ordinance of the 26th of April, 1645, recognizes that which then was, and I believe has ever since been, the usage amongst the Dissenters, namely, the occasional preaching of students for the trial and exercise of their ministerial abilities; by excepting from the prohibition to preach as before noticed, "such as were intended for the ministry, who were to be allowed for the trial of their gifts, which exception was evidently designed for students."

This explanation appears to narrow the third class of exemptions beyond the intention of the statute. The phrase "Pretending to Holy Orders," if synonymous (as it unquestionably is) with *claiming* holy orders, surely imports much more than becoming a candidate for future ordination, though it may also include persons in that situation. In one sense it may be the same as looking forward to ordination and preparing for it; but it agrees also, and falls in more naturally with the notion of a present claim to present spiritual authority, or right to teach or preach,

which the claimant considers as amounting to ecclesiastical ordination, however inconsistent either with the rites of the established Church, or the usages adopted by particular Dissenting Sects; as for instance the *Quakers*, many of whom consider that they have a right to teach or preach, although not ordained like other ministers. And it may be fairly doubted whether, after giving the first place to the only Holy Orders recognized by the law, the act did not purposely adopt a phraseology proclaiming its ignorance of every other species of ordination, but extensive enough to include them all.

Such enquiries, however, are rather matter of antiquarian research, than of practical utility, if the main propositions be correct, which it is the principal object of the present argument to establish: That the magistrates in Sessions have no power either to refuse the oaths, or to enquire into the qualification of him who claims to take them; that such claim is a sufficient warrant for the Court to administer them, and the bare statement of the description in which the party wishes to take them, sufficient evidence of his answering that description; and that if that description is comprised in the eighth section of the Toleration Act, the Court of Quarter Sessions is by law compellable to administer the oaths and the declaration, and to permit the subscription to the thirty-six articles, of which the clerk of the peace is also compellable to enter a record, and to grant a certificate.

What is the object of the eighth Section? Solely to remove heavy pains and penalties, deeply affecting, not only the religious rights, but the property and personal liberty of certain specified liege subjects of the King; who are so far from criminal in the eye of the existing law, that in some cases their description actually entitles them to extensive and valuable privileges. By a former law, indeed, those who fall under that description incur severe forfeitures, unless they do certain acts, in which the magistrates must concur. Does not this necessarily confer on the parties affected by the law, an option to call upon the magistrates to concur with them in doing these acts?

If all religious and party feeling were laid aside, and we were examining the case of physicians, barristers, persons following any secular trade or profession; who might be made liable to penalties for exercising their trade or profession, unless they took an oath that they would conduct themselves honorably therein, which oath a particular Court was empowered to administer; could any man doubt that in such a case the Court would be bound to administer the oath to all, who in any of those characters might wish to take it? The parties are surely the best judges of their own situation and their own interests; and it would be thought preposterous in such a jurisdiction, to enquire whether they were or were not actually subject to the penalties, which they wished to make sure of avoiding by the simple process of taking an oath (we will sup-

pose) of allegiance to the government, or of fidelity to their employers. When the physician tendered himself for this useful, or at least, harmless purpose, would the justices be anxious to enquire into the regularity of his diploma, or the sufficiency of his skill, or the authority of his university to confer degrees in medicine? Still farther, would they feel it their duty to enquire whether he had actually incurred the penalties by practising? if he has, the interrogatory has made him criminate himself; and if not, would they reject him because, having never attended a patient, or received a fee, he did not fall within the ordinary description of a physician? In the same manner—would the young professor of the law be questioned as to his clients and his briefs, and be either condemned for practising without having qualified, or refused, for want of practice, to be allowed to qualify? Gentlemen, this Court of Quarter Sessions can do nothing for you: according to our interpretation of the Act, you, Sir, are no barrister, nor can you, Sir, be properly styled a physician.—But at least, we humbly *pretend* to those characters, and beg permission to protect ourselves from possible inconvenience by taking the oath enjoined by the legislature. Gentlemen, you are mistaken as to your own pretensions; you do not *pretend*, within the Act of Parliament;—there is no remedy here; but you may apply to the Court of King's Bench for a *mandamus*. And what would the Court of King's

Bench say to such an application grounded on such a refusal?

There is no occasion, however, to have recourse to imaginary cases, the present practice of the superior Courts, under the Test Act, being itself a standing precedent on this very subject. All persons that shall be admitted to civil or military offices, or shall receive any pay, salary, fee, or wages by reason of any patent or grant from his Majesty, or shall have command or place of trust, from or under his Majesty, &c. or shall be in the household, or in the service or employment of his Majesty, or the Duke of York, residing within, or within thirty miles of, London or Westminster, are by that Act required, under heavy penalties, to take the oaths of allegiance and supremacy in his Majesty's High Court of Chancery, or in his Majesty's Court of King's Bench, between the hours of nine o'clock and twelve in the forenoon, in the next term after their admittance to office; and during the time of taking thereof, all pleas and proceedings in the said respective Courts shall cease: and all such persons shall also receive the Sacrament of the Lord's Supper, according to the usage of the Church of England, on a Sunday, within three months of their receiving such employment.

Was it ever thought necessary, when civil or military officers have tendered themselves to take the oaths, to require evidence of their appointment, or to satisfy the Court that the office was of such a nature as to fall within the Act requir-

ing them to be taken? If such enquiries and discussions had been admitted, the cessation of all pleas and proceedings in the Court of King's Bench would not be temporary, but eternal; and the Committee of the House of Commons would throw away their labor in investigating any farther the causes of the delay complained of in the Court of Chancery. But the officers do not come to prove their title to offices; they come to protect themselves from penalties, to which they believe they should otherwise be exposed, but which they may avert by taking those oaths which the law has enjoined for the general safety of the King and his government: and they would be as much astonished to be required to prove their right to take them, as if the Clergyman had insisted on legal evidence of their sustaining that particular *character*, in which they had taken the sacrament on the preceding Sunday.

It is apprehended, that the question as to the discretion of the Magistrates on this subject, has already received a virtual decision, in the case of the King against the Justices of Derbyshire,* which was brought before the Court of King's Bench, on the nineteenth section of the Toleration Act: A motion having been there made, for a mandamus to *register* a Meeting House, which was certified to the Quarter Sessions, as a place set apart for the meeting of Protestant Dissenters, "*Morton and Blackstone* shewed for cause; 1st. That the

* 1. Sir W. Black. Rep. 606.

parties certifying, have not shewn under what denomination of Protestant Dissenters they fall, so as to intitle themselves to the indulgence shewn by the Toleration Act, which only meant to give ease to tender consciences, when professing such principles, as neither endanger the civil Government, nor undermine the fundamental doctrines of the Christian Religion. These people may be Arians or Socinians. Suppose them only Methodists, (which was the fact) as those do not dissent from the Church of England, but only pretend to observe her doctrine and discipline with greater purity than their neighbours; it may be a very serious question how far they are the objects of the Toleration Act, and privileged to meet in conventicles. 2d. The parties applying are not of the neighbourhood, so as to be able to resort to it, when recorded. It was held till 10 Ann. c. 2. that a Dissenting Minister, who had qualified in one county could not officiate in another. More reasonable to require that the persons certifying should be of the neighbourhood, who may bona fide use the Meeting House, when registered. When registered, it acquires some privileges; as by 1 Geo. 1, c. 5, it is Felony to demolish it. May a person at any distance, and who is no Dissenter, certify any tenement to the Sessions, and thereby give it those privileges? 3d. The persons certifying do not appear to have complied with the terms of the Toleration Act, by taking the oaths and making the declaration. This required by the Court, in R. v. Lar-

wood, Salk. 168, 4 Mod. 274, and was complied with in Green and Pope, Lord Raym. 125.

" But the Court was of opinion, that in registering and recording the certificate, the Justices were *merely ministerial;* still if the persons resorting to it, did not bring themselves within the Act of Toleration, such registering will not protect them from the penalties of the law.

Rule for Mandamus absolute."

Before the full effect of this most important judgment is admitted, an objection will perhaps be started, which ought to be cleared away, though it does not appear to have been advanced by the counsel, who argued against the late rules for a Mandamus, nor to have suggested itself to the learned judges. Under the last clause of the Toleration Act, the clerk of the peace is *required* to register a certified Meeting House: under the second clause of the same act, the sessions are *required* also to administer the oaths there mentioned to all persons tendering themselves: the Test Act likewise by a separate clause *requires* the High Courts already mentioned, to administer the oaths of supremacy and allegiance; whereas by the eighth section of the Toleration Act, which we have been so long employed in examining, the Magistrates are only *empowered* to administer the oaths, declaration, and articles, to Dissenting Ministers. Hence the argument arises, that though ministerial only in the former cases, yet they are invested, by the eighth section with a discretionary power to admit or refuse the persons

there described. Mr. Smith appears to have been the discoverer of this objection*, which he endeavours to remove; and Mr. Belsham, in a Letter addressed to Lord Sidmouth † on the occasion of his late bill, observes, that though the two expressions have hitherto been thought equivalent, and that both are therefore imperative on the Magistrates, "yet the variation of the phrase, has of late given a handle to some Magistrates, not friendly to the Dissenters, to conceive that they were vested with a discretionary authority, and in consequence of this, they have only registered those, whom in their discretion, they have thought worthy of a licence." He observes a little farther, on, that other magistrates, "interpreting the statute more agreeably to its original purpose and genuine spirit, regarded the expressions as imperative, and as empowering them to *administer*, but not to *refuse* the tendered oaths and declarations."‡ The change of phrase is however undoubtedly remarkable, and in a legal point of view, deserves a full consideration.

Mr. Smith § adverts to the difference between the eighth section of the Toleration Act, and the first of the nineteenth of the present King, for granting further relief to Protestant Dissent-

* P. 45.

† A letter to the Right Honourable Lord Viscount Sidmouth, upon the subject of the Bill lately introduced by his Lordship, into the House of Peers, &c. by Thomas Belsham, Minister of the Chapel in Essex Street, 1811.

‡ P. 15. 14 § P. 46.

ing ministers and schoolmasters. In the former the word is *empowered*, in the latter *required*: It would however be singular if those who take *all the oaths*, and subscribe *all the articles*, should be found to be endowed with inferior privileges, and to hold them on a more precarious tenure, than the more scrupulous persons, for whose further relief the subsequent act has provided a much more general form of profession. This would operate as an encouragement to tenderness of conscience, and hold out a bounty to religious scruples. That gentleman remarks * " that the words which the Court is hereby *empowered* to administer," &c. have no immediate relation to the making and subscribing the declaration against popery, nor any relation to the subscription to the articles of religion; but appear to be restricted to the administration of the oaths; and to have been inserted merely because the description of the Court in this section is enlarged,"—the first section speaking only of the General Sessions, and the eighth adding the Quarter Sessions.

It may be farther observed, that the power given to magistrates is not to enquire whether the applicant falls within the description, under which he claims; not to pronounce, upon examination, as to his fitness, or unfitness to act as a Dissenting Minister; not to examine whether his ordination has been episcopal, or presbyterian; or what are the orders to which he pretends, or in what manner he shapes his pretension to them;

* p. 46.

nor to ascertain the fact whether he has taught or preached to what the law would denominate a congregation. They are neither empowered to summon witnesses, as to matter of fact, nor expected to form any opinion on points of law or theology; but simply to administer the same oaths, as those which they are *required* to administer under the former enactment.

The truth is that the construction which would give the magistrates authority to enter into these enquiries, stands precisely on the same footing whether they are *required* or *empowered;* and consequently all the decisions and precedents, which shew them to be *merely ministerial* where the former word is employed, are equally applicable where the latter is inserted. They are *required*,---true; but they are required to do some particular thing, and is it not equally necessary for them to receive accurate information that the subject falls properly within their jurisdiction, when it is cast upon them as a *duty* by the law, as when they are entrusted with the power of refusing or admitting at their discretion? The Courts of King's Bench and Chancery are *required* to administer the oaths of allegiance and supremacy to persons filling offices or employments under the Crown: according to the argument we are considering, would they not be obliged, or at least authorised, to receive legal proof that such persons do fill the offices, in respect of which they desire to qualify? The justices, at their general session of the peace, are *required* to

administer the Protestant's oath to such ministers as offer themselves, being persons in Holy Orders, or pretended Holy Orders, or pretending to Holy Orders, and being also a teacher or preacher of any congregation of Dissenting ministers, who may scruple to declare and subscribe according to the requisition of the Toleration Act. Such persons, but such persons only, the Court is *required* to admit. In order then to ascertain whether this obligation lies on them or not, the magistrates must have authority to enquire, in addition to all the parts of the several descriptions in the Toleration Act, whether the party does, or does not, entertain those scruples which are also made a condition precedent to his admission. In like manner the clerk of the peace is *required* to register every certified congregation or assembly for religious worship: may he not then demand proof of his being so required, by such evidence as would prove that there is such a congregation or assembly for the purpose described in the Act, and that it is in all other respects a legal congregation? NO: the case of the King and the justices of Derbyshire before cited has declared that he can ask no such questions; that his office is *purely ministerial*, and that the certificate of the certifier, not superior in efficacy to the assertion of him who describes himself as falling within the eighth section, compels him to perform that act of registration, which is necessary to entitle such assembly to the powerful protection thrown around it, both by the

Toleration Act, and the statute of George the First.

After all, perhaps, the most complete answer to the argument which would assign discretion to the word *empowered*, while it admits the obligation imposed by the word *required*, is that it has the fatal fault of proving too much. If that were the consequence of the distinction, the magistrates would not only have jurisdiction to enquire into all the facts, and pronounce upon the law, but they would also have authority to refuse the oaths to such persons as, according to their own judgment, as to both, should unexceptionably answer the description in the eighth clause. Surely no man living will contend for their enjoying this authority!

Notwithstanding all that has been urged on this topic, it may still be justly deemed singular, that the compulsory language adopted in the second section of this important statute, should have been abandoned in the eighth; and the Parliamentary debates, which occurred at the time of the passing the bill, and were thought likely to throw some light on the cause of the difference, have been ineffectually searched for that purpose. But the best mode of arriving at the true interpretation of a repealing or suspending law, is to examine the law repealed or suspended, and the author is persuaded that a reference to the Act which was intended to be principally affected by the eighth section, will be found entirely to remove the difficulty. It is intended to repeal

with respect to those who qualify, the *Five-mile Act* and the *Conventicle Act*; in the latter, *Ministers* are never mentioned; persons attending at conventicles, and persons preaching or teaching there are the criminals denounced by it. But the former Act attaches upon Ministers alone, under all the variety of designations belonging to that character, "parsons, vicars, curates, lecturers, and other persons in Holy Orders, or pretended Holy Orders, or pretending to Holy Orders," (the first time that these words are to be found in any Act of Parliament) "stipendiaries, and other persons who have been possessed of any ecclesiastical or spiritual promotion." These are clearly the ministers ejected from their benefices by the Act of Uniformity; and the *Five-mile-Act* makes them actually criminals, and exposes them to the severest penalties, if they venture to be within five miles of any city, &c. without having previously declared their unfeigned assent and consent to the Liturgy, and subscribed the declaration therein mentioned, and subscribed the oath of non-resistance, "which oath the said justices are hereby *empowered* to administer."

The eighth section of the Toleration Act, assuming probably that few of the ministers expelled from their livings, after the restoration, were in being at the time of the revolution, and assuming apparently that ministers of the established church were not likely to be dangerous to the state, omits all the descriptions just enumerated, except the three, on which so much discussion has already

taken place, and adding the two denominations of teachers and preachers of dissenting congregations, applies a remedy in their behalf to all the particular evils entailed on them by the *Five-mile Act*. Instead of requiring assent to the Liturgy, it is satisfied with a subscription to thirty six of the articles;---for the declaration required by the act of uniformity, it substitutes that against transubstantiation, enacted by the 30th of Charles the 2d, statute the 2d ;---and the abrogated oath of non-resistance, it replaces by the oaths of allegiance and supremacy which were introduced on the accession of William and Mary, to be taken at the Court of Sessions, "which court is hereby *empowered* to administer the same." This resolution on the part of the legislature to make the eighth clause of the Toleration Act (if it may be so expressed) *take issue on every point* with the persecuting act of the 17th Charles the second, appears to account so satisfactorily for the variation of language pointed out by Mr. Smith, as to remove all suspicion of their intending to give a less perfect indulgence to the pastor, than to his congregation.

Cases may unquestionably be conceived, and have sometimes occurred, in which so much obvious inconvenience would have resulted from putting on an act of parliament the sense which its language naturally bore, that some slight violence has been occasionally done by Courts of Justice to the mere grammatical phraseology, in

order to prevent some enormity, or some mischief, which could never have been in the contemplation of the legislature. The practical absurdity of the more obvious construction, has been deemed sufficient to justify a departure from the strict letter of the law. Some persons appear disposed to apply this test to the eighth section of the Toleration Act. It is extremely necessary, say these reasoners, that the magistrates should *know* the party applying to answer some one of the descriptions, to whom the Act has given indulgence. But what connexion is to be traced, or needs to exist, between this knowledge on the part of the magistrate, and the exemption desired on behalf of a minister, they do not explain. The taking of the oath, &c. confers no license of any kind; the certificate merely states the fact of their having been taken; even if it went on to state in what *character* they were taken, it would not be legal evidence that the party filled that character. The exemption is not claimed, nor can it be bestowed at the Sessions; but in some subsequent proceeding,—either in a prosecution for some offence,—or a requisition to fill some burdensome office, the party is to make out by *other evidence* that he answers the description exempted. If he succeed in doing so, he must also prove, that he has taken the oaths which are a necessary passport, but by no means of themselves, a sufficient warrant for the benefit he claims; if he fail, the only consequence

is, that he has taken those oaths which are deemed essential to the security of the constitution, without that immediate advantage to himself, on which he possibly calculated.

But "is the time, the precious time of the Court of Quarter Sessions, to be wasted in the fruitless administration of oaths, &c. to persons, who may at last derive no benefit from taking them?" It is really worth a little trouble to strike the balance between both sides, in this account of time. On the one hand, the oaths are taken, and the whole affair concluded, with arrangement and accommodation, in a very few minutes, even if several persons address themselves to the same Court: on the other, if an enquiry is once commenced on such a subject, and by such a Court, who shall prophecy the period of its termination? What are holy orders? what are pretended holy orders? what constitutes pretending to holy orders? what is a teacher? what is a preacher? what is a congregation? In the case of endowed chapels, rival ministers may lay claim to the office and its emoluments, and a real difficulty may attend the question, which of two claimants has been legally appointed by the church, which each believes himself intitled to instruct. This is a small specimen of some of the leading enquiries, necessarily branching out into a multiplicity of collateral doubts, which a too great solicitude for the economy of time, would refer to the decision of every bench of magistrates!

In one of the cases lately brought before the Court of King's Bench, for a mandamus to admit a teacher of a congregation to qualify, it appeared that the magistrates of the county of Suffolk, had, of their own authority, laid down a rule, that they would admit no man to qualify as the preacher of a congregation, unless he should produce a certificate of his being so, signed by six of his flock.* The Attorney General, in arguing against the mandamus, if we may trust the reports of this case, which have been published in the journals of the day, does not appear to have contended either for a discretionary power in the justices, nor for their right to establish different rules from those laid down by the legislature, nor for the validity of the particular rule in question: which indeed, is not only objectionable on the grounds here stated, as exacting evidence of a fact, into which there exists no right to enquire; but, further, on general principles of law, in setting up as legal evidence, such a written document as is not admissible in proof at all, except where express Acts of Parliament have made it so. But the Attorney General is reported to have urged that the reasonableness of such a rule made non-compliance improper; "That the jus-

* In Buckinghamshire, a preacher was refused, because he had *only* eight persons who signed his certificate,—a larger number than that which forms an entire congregation for the penal purposes of the *Conventicle Act!*

tices, having adopted this rule, *could not* depart from it; and that nothing was easier than compliance on the part of the prosecutor." The application was dismissed, for that time, on a point of form: but Lord Ellenborough is also said to have lamented that the prosecutor did not comply with so easy a course, and to have observed that both parties stood on the extreme point of right.

Though any length of observation on a case lately argued, and at this moment remaining for decision in the Court of King's Bench, might appear presumptuous, there can be no impropriety in shortly alluding to another case, which was disposed of in the last term, as to the authority of a Court of Quarter Sessions to establish rules of evidence unknown to the general law. The justices of Lancashire had come to a resolution, and were said to have acted upon it for a series of years, not to admit as a witness an occupier of lands situate in a litigating parish, unless by the production of the assessment he can be proved not to be a rated occupier. Much may be advanced in favour of this rule: its convenience is unquestionable, and the practice was undisputed: but Lord Ellenborough declared that where points of evidence are referred to the Court of King's Bench, they must be decided by their legal merits, not according to any supposed measure of reasonableness or convenience, and still less by the mere usage.

Where compliance is exacted with the most reasonable rule established by another, it would be an admission of the authority of him who exacts it, to lay down, to revoke and alter it, and to establish new ones, at his discretion. And, in this particular case, if any one person, claiming to qualify under the eighth clause, had acceded to such a demand as that which was made by the Suffolk magistrates, his acquiescence, however free from inconvenience to himself, might have become a precedent for affecting multitudes of his brethren. It is easy to conceive circumstances in which it might be extremely difficult for others to comply with it; and the magistrates might be induced to follow up their first rule with an accumulation of others, of far more questionable propriety.* The reasonableness of the conditions might perhaps indeed be revised by a superior court, but the right to impose any conditions is in question; and if once that power be granted, its exercise would be protected in almost every instance by the known reluctance of the King's Bench to controul the discretion of magistrates, when untainted with positive corruption. Heavy expences must be incurred by such applications, which, after all, would only refer the claimant from one discretionary tribunal to another, when he grounds his right to protection on the plain letter of a positive statute. It is impossible to set a limit to the injurious conse-

* See note at page 51.

quences that might gradually ensue, all of which would be justly traced to the first improper concession on the part of an unresisting sufferer: and while the Court of Session cannot be correctly described as standing on the point of right, in exacting what the law has given them no power to demand, the non-compliance of the dissenters is a necessary act of self-defence, an indispensable protest against an usurped authority, which, if not inconvenient in its immediate operation, is certainly unjust in its principle, and injurious by its example*.

In another case, the magistrates of the county of Gloucester refused to admit a person, who came before them as pretending to holy orders, because they thought the description he gave of himself did not answer that definition: and it was then observed, that these words

* It is worthy of notice, that by the statute 31st George 3. c. 32. which may be called the "Toleration Act of the Roman Catholics," and which was evidently framed on the principles of the statute of 1st William and Mary, the Clerk of the Peace is *required* to record the name, and give a certificate to such persons in holy orders, or pretended holy orders, *as shall demand the same*. Similar privileges are also granted by this Act to Roman Catholic Priests, as to Dissenting Ministers by stat. William and Mary, and surely it never can be intended to place Protestant Dissenters under greater restraints, and to render their privileges less secure than those of the Roman Catholics; while the Roman Catholics are authorized to *demand* the recording of their names, and certificates thereof, there does not appear any legislative reason for denying this privilege to the Protestant Dissenters.

were too loose and indeterminate to allow of perjury being assigned on an affidavit containing such a statement. Yet it should appear to be sufficient to found a claim for protection against the penalties, in the very words of the Statute, creating the exemption. And the remarkable generality of the language employed in the Act, combined with its general spirit and avowed intention, furnishes another argument against all unnecessary scrutiny into the meaning of those terms. If indeed, a charge is brought against an individual for an offence committed under the former Acts, who justifies himself as falling within an exempted class, the magistrate cannot avoid deciding whether he answers such a description. But here a difficulty of a curious nature might arise: for as the object of the new law is to protect against penalties inflicted by the old, it necessarily happens that the persons denounced as criminals by the latter, are the same with those entitled to qualify under the former. He who claims to qualify as the teacher of a congregation, by that description acknowledges himself guilty of an offence of no light magnitude, which nothing can purge, except taking the oaths. But suppose the Quarter Sessions, after enquiry into the nature of the Acts from which he infers his own guilt, should in the exercise of their discretion pronounce in favour of his innocence, and thinking him no teacher, refuse to administer the oaths; fortified by this opinion, he proceeds in his former

course, till some officious neighbour informs against him to a single magistrate who, disagreeing with the majority of his brethren, in the exposition of laws not conspicuous for precision, condemns him as a teacher, and convicts him in the penalty. The case is more unfortunate than improbable; and the culprit suffers for not taking oaths which the Sessions have refused to administer; and possibly upon evidence which he has adduced against himself, as a reason for being allowed to take them.

Having thus rapidly glanced at the cases yet pending, it would be improper to omit one which has lately been decided, to which more important consequences have sometimes been attached, than will be found to belong to it on more strict examination. In consequence of a refusal by the justices of Denbighshire, to admit one David Lewis, who claimed to qualify as teacher under the eighth section, because he produced no certificate * of his presiding over a separate congregation, the Court of King's Bench was moved for a mandamus to compel them to admit him, founded on affidavits, in which he described himself as "a protestant dissenter, who preaches to several congregations of protestant dissenters." Lord Ellenborough enquired whether the person applying now swore to the fact of his being the teacher or preacher of any separate congrega-

* 14 East's Reports, p. 286.

tion of protestant dissenters? and, that question being answered in the negative, his lordship afterwards observed that the *chairman of sessions might have been wrong in asking this person for a certificate* of his having a separate congregation; but still, to entitle himself to succeed in his application," (i. e. the application for a mandamus) "he ought to shew himself to be the acknowledged teacher or preacher of some particular congregation, or to bring himself within some other qualifying description in the act, in order to be intitled to the exemption * which he seeks." And it was added by Mr. Justice Le Blanc, that if the party be in Holy Orders or pretend to Holy Orders, though he have no particular congregation of his own, he would come within the eighth clause: but if he apply merely as a teacher or preacher, not pretending to Holy Orders, he must state himself to be the teacher or preacher of some particular congregation of Protestant Dissenters by whom he is recognized in that character. Mr. Justice Bayley in confirmation observed, that "this clause of the Toleration Act meant to relieve persons who had protestant dissenting congregations severally attached to them, at the time they made the application,

* It is however, worthy of remark, that *no exemption* was claimed, but merely the privilege of being permitted to swear allegiance to the King, by which the claimant would have relieved himself from the penalty of £40, for the *crime* of teaching or preaching in a conventicle.

from the penalties imposed by former Acts, for officiating as preachers of such congregations."

The inference which has in several parts of the country been drawn from the above decision appears to be by no means warranted by it, since the question was not directly brought before the judges, whether the inferior jurisdiction possessed the power of instituting a judicial enquiry into the real character of the claimant; and David Lewis admitted their right to do so, by contesting only the construction which they had put on the words of the Statute. The disputed point referred by him to the Court of King's Bench was not, whether a party claiming had a right to be allowed to qualify, but whether himself or the magistrates had formed the more correct opinion as to the meaning of the eighth section? Upon which the court agreed with the magistrates, and thought the applicant mistaken. The effect of his affidavit, which might easily have been so framed as to bring their authority into question, was virtually no more than this---Am I, or, am I not, a teacher of a congregation within the eighth section? if I am, I pray a mandamus; if not, I am indifferent about it. To this question the Court have answered in the negative, and the effect of the judgment is simply an opinion, that the word congregation there means a separate congregation; as he did not state himself to be connected with such a one, it follows that it would be useless for him to take the oaths;

but, as if by mutual consent, the original right of the sessions to make enquiries as to the fact, or judicially interpret the law, was placed entirely out of sight, and in the result, the case is confined to the meaning of a single expression which occurs in the Act of Parliament.

If any further comment on this case could with propriety be offered, it might be remarked that, according to the construction which virtually includes the epithet "*separate*" in the word "congregation," all the militia laws passed from the 26th of the king*, to the present time, have unnecessarily deviated from the language adopted by the parliaments of King William, Queen Ann, and the 19th year of the present reign, in explicitly confining the exemption to teachers of *separate* congregations. *A congregation* having been now judicially ascertained to be *a separate congregation*, the latter phrase, when introduced into subsequent Militia Acts, did not narrow the privilege conferred by the former. And Mr. East appears to have considered those words as obviously bearing the sense which they have now received, for in quoting the eleventh clause in a note, by way of confirmation to the Denbighshire Case, he has distinguished them by italics. Yet, according to Dr. Johnson, and to the common idiom of our language, the indefinite

* Ante pp. 26, &c

article signifies *any*, not *one* exclusively * ; and it would be strange to say, that the dissenting instructor of *three* pupils, is exempt from burdens imposed on him who undertakes the education of *a pupil*. Besides, there is ground for believing that another, important object might also have been in contemplation, since the eleventh section is so expressed, as to restrict the grant of immunities to the period, during which the person in Holy Orders, &c. is also the actual teacher of, or preacher to, a congregation: an object which is effectually secured by the express words, which have been already extracted † from the Local Militia Act. Thus interpreted, the emphasis of the sentence should be shifted from *a congregation* marked out by Mr. East, to *teacher or preacher of a congregation*, i. e. one actively employed as a religious minister.

Without insisting on the remark that the word *permanent* would perhaps have been more effectual than *separate*, since every congregation is separate as long as it continues, there is a farther reason for believing that the latter word has been as improperly selected for the purpose to which it has been applied in the Militia Acts, as it was needlessly inserted in them. It was originally employed in a perfectly different

* See Stat. 31. Geo. 3. c. 32, sect. 8, where the words are, "being a minister, teacher, or preacher of *any* congregation, &c."

† Ante, p. 28.

sense. The first act of parliament, in which "separate" is found in union with "congregation" is believed to be the Act for the further security of the Succession passed in the first year of George the First, (Stat. 2. c. 13.) when the house of Hanover was raised to the throne. By that act, all persons holding any office, or invested with any authority, or sustaining any kind of public character, were required within a certain time, to take the oaths of allegiance and supremacy. In that Act civil and military officers are first enumerated, then officers of the royal household, then all ecclesiastical persons and members of the universities, then all schoolmasters and ushers, and afterwards "all teachers and preachers of *separate* congregations." It is utterly impossible to suppose that this important security for the new government was to be required from such dissenting ministers only, as had the care of a *single* congregation, yet that body of men is mentioned in no other part of the Act. We must therefore enquire whether the word separate will not bear another sense, different from the ordinary one, which makes it synonymous with *distinct*; and if we can find one, general enough to avoid all ambiguity, and comprehensive enough to encompass all descriptions of persons intended to be included, we need not hesitate to adopt such construction as the true one. It may then be confidently affirmed, that a *separate congregation*, in

the Act of George the First, is "a congregation separating from the Established Church,"---a congregation of *separatists.*

With reference to what has been already advanced on another part of our subject, the reader of the same act is requested to observe by the way, that the king is authorized to appoint commissioners who (by sect. 30) are *empowered* only to administer the oaths in question; they are not *required* to tender them. But those who did not take them incurred a penalty of £500. Could these commissioners have *refused* to administer them to any one who claimed to take them? In case of such refusal, would the Court of King's Bench have hesitated to compel them by mandamus? And where is the distinction, in principle, between the law now referred to, and the eighth section of the Toleration Act?

In resuming our consideration of the supposed inconveniences that might be imputed to our construction of that important law, it is time to advert to that, which has been principally denounced, as being at once of the most enormous magnitude, and of the most malignant character. That the certificate, delivered to the person who has qualified at the Sessions, should protect him from serving in the militia, and from filling many civil offices, not less burdensome than useful, does appear to be a dangerous encouragement to the worst species of dishonesty: nor can any thing be more justly deprecated, than that thou-

sands of able men should be tempted to deprive the country of their exertions, by basely resorting to blasphemy, profanation, and hypocrisy. In every mode of considering it, the evil would be unquestionably enormous, and its existence to a great extent has been pretty generally assumed.

In the late debate on Lord Sidmouth's bill, the Lord Chancellor, with much pleasantry, stated that he himself, when a young man, had been advised to defraud the ballot, by giving sixpence for a preacher's certificate; and Lord Ellenborough, during the last term, while professing his regard for liberty of conscience, declared that it must not be made the pretext for those evasions, of which the consequences would undermine the liberty of the country.

Such powerful and popular reasons have repeatedly been urged as arguments for strictly watching the grant of certificates, for confining the privilege within its narrowest legal limits, for exerting every possible precaution to prevent its abuse, and for investing the Court, which issues such protections, with the fullest power of examining and ascertaining that he who applies for permission to qualify, answers that description which the statute intitles to such protection.

That such arguments, if just, are of great and extensive consequence, no man can deny: they have for that reason been purposely reserved to this place; and because they naturally connect the first division of this Tract with the second.

Exemptions from penalties formed the first head of our enquiry; positive immunities the second, in the outset of which, it will not fail to be observed that the importance of these several operations of the Act to the body of Dissenters, is in the inverse proportion of their importance to the country at large. The country derives no advantage from the infliction of penalties, from which the exemption is every thing to the Dissenters: while the state has a direct interest in the service of all its population, and the Dissenters have comparatively none, in endeavouring to avoid their fair proportion of all the necessary burdens.

The *exemptions* are created by the second and *eighth* sections of the Toleration Act; the *privileges* are conferred by the eleventh: but the persons comprised in all of these are carefully and strongly distinguished. Under the second, *all* nonconformists, taking the oaths and subscribing the declaration, may with impunity transgress certain Statutes therein enumerated: under the eighth, the more limited classes of persons in Holy Orders, or pretended Holy Orders, or pretending to Holy Orders, and teachers and preachers of congregations, may in like manner relieve themselves from other penalties: but in the eleventh section, the description is narrowed very considerably. Those only are excused from the common law obligation of executing public offices, who may fairly be regarded as actually

engaged in ministering to the spiritual wants of the sects to which they respectively belong, namely such teachers and preachers as are in Holy Orders, or pretended Holy Orders, *and are also ministers, teachers, and preachers of congregations:* and the 19th of George the third, before cited, extends exemption from the militia to the same persons, described almost in the same words*.

A broad line of distinction between those, who desire impunity for the offence of being Dissenters or Dissenting ministers, and those who claim valuable privileges in the latter character, is therefore, most clearly marked by the Toleration Act itself, and it is preserved in all the subsequent Statutes applicable to the same subject. The former are interested in being permitted to qualify at the Sessions, for the single purpose of avoiding punishment; the latter, would derive from their qualification a diminution of their share of the public burdens, which would consequently fall with increased pressure on their fellow-subjects. But it is important again to call the attention of the reader to this striking fact, that the Court of Sessions, though a necessary instru-

* The statute 31 Geo. 3. c. 32. before cited respecting Roman Catholics, clearly expresses the same sense; by sect. 8 it is enacted "that every priest, or other person in holy orders, or pretended holy orders, *being* a Minister, Teacher, or Preacher of any congregation, &c. who shall take and subscribe the oaths, shall be exempted, &c."

ment for perfecting the qualification, whether for the one purpose or the other, is neither required nor empowered to exercise any judicial authority, to institute any enquiry, or pronounce any sentence.

No penalties incurred for offences against the *Conventicle Act* and the *Five-Mile Act*, can be levied originally by the Court of Sessions; they are within the authority of a single justice; but if the defendant has qualified within the Toleration Act, that shall excuse him. In this case, his answering the description in the eighth clause, is his crime, his compliance with its demands, his justification. The offence it would be necessary to make out by testimony, the justification would be proved by production of the certificate given by the clerk of the peace. But against a person drawn for the militia no charge is made, no evidence preferred; his liability springs from the mere relation of a subject to the state, of a citizen to his country. The certificate must indeed be produced, if he wishes to escape service: but it is not here as in the other cases, of itself sufficient for his protection. As no conviction can be had, without proof of the crime committed, so no privilege can be allowed, without proof that the party belongs to the privileged order. But in neither case has the Court of Quarter Sessions any other duty to perform, than that of administering the oaths and the declaration, and seeing the articles subscribed; a duty, one would think,

as purely and properly *ministerial*, as that of the clerk of the peace, who registers in a book the fact that those requisitions have been complied with, and grants to the applicant a certificate of the fact.

The notion then that a certificate of having taken the oaths operates as an exemption, is entirely groundless: it may perhaps in some degree be traced to language already cited from some of the militia acts, describing a *licenced* teacher of a congregation, and seeming to imply that a licence is granted by those, before whom the oaths are taken. This language indeed is not in strictness incorrect, for when the law grants impunity to certain acts, provided certain conditions are fulfilled, the fulfilment of them, does, by operation of law, amount to a license. But in common usage, a different sense is given to the word, which imports a written instrument given by a competent authority, and sanctioning particular proceedings. Hence all the confusion in which the subject has been involved, the erroneous presumption that magistrates are authorised to grant a licence, and the conclusion that they are invested with authority to refuse the administration of the oath.*

To admit or refuse the several dispensations from the ballot, is a power lodged in the hands of those who are entrusted, by the legislature,

* The word "license" is very properly omitted in the local militia bill now before parliament, ante page 28.

with the execution of the militia laws, and of judging in the first instance, of the validity of all exemptions. If the party be dissatisfied with their decision, it may in various modes be legally and effectually revised; and the question, if confined to doubtful facts, may be submitted to the consideration of a jury; or, if arising from the difficulty of the law itself, may be placed on the record, and undergo the solemn deliberation of those successive tribunals, which the constitution has called to pronounce on questions of this nature. But to whatever court the appeal may be made, the mere taking of the oaths, &c. is in itself inoperative: and unless according to the judgment of the Court, in the King against the justices of * Derbyshire, "the party can bring himself by other evidence within the Act of Toleration," the oaths will have been thrown away for that particular purpose. But where is the mischief, or the inconvenience, of the attempt thus unsuccessfully made? The individual, though disappointed as to the extent of his hopes, will have protected himself against heavy penalties by giving unequivocal proof of his loyalty; and the State will have received from one more of its subjects those assurances of attachment, and those engagements to fealty and allegiance, which its wisdom has adopted as the best security against foreign and domestic enemies.

* Ante page 39.

That bare Toleration should be generally diffused, while important privileges were much more sparingly granted and more cautiously distributed, would naturally be expected under any circumstances, but most peculiarly under those which preceded and accompanied the passing of the Toleration Act: and its enactments, when examined, perfectly coincide with such an expectation. The result of its second, its eighth, and its eleventh clauses is, that *all* men may dissent from the Church of England with impunity: that all Dissenting Ministers may teach their doctrines with impunity: and that such ministers, (but such alone) as are actually employed in performing the duties of their station, shall be excused from executing certain offices. The distinction, thus marked, is widened by all the subsequent statutes relating to the militia, as every one superadds new terms to the definition of those whose service is remitted. Persons in Holy Orders, &c. derive impunity from the eighth section: but those who procure exemption from the militia are designated as "licensed teachers of separate congregations, in Holy Orders, or pretended Holy Orders, and not carrying on any other trade, or exercising any other occupation for a livelihood, except that of a schoolmaster."* Can any two descriptions be more totally different? And yet the preposterous opinion has prevailed almost universally,

* Ante, pp. 28, &c.

that any person qualifying under the eighth section of the Toleration Act, *thereby* purchases the benefit granted by the Militia Laws!

The fluctuation of these privileges at different periods has been already noticed; nor is it unworthy of remark, that the Legislature, which so frequently altered the character, under which they were to be claimed, never once thought it necessary to introduce any such change into the description of persons intended to be relieved by the eighth section of the Toleration Act. Had exemption from the Militia been coextensive with qualification by taking the oaths there specified, the caution exerted in modifying the description of privileged persons would have been a waste of words and labor.--Let it be observed too that, though the attention of Parliament was thus perpetually drawn to the actual state of Dissenting Ministers, they never interfered either to condemn or alter the practice, universally observed by all Courts of Quarter Session, of admitting all persons to qualify, to whom they were empowered to administer the oaths of qualification.

That some frauds and abuses may have been practised on the liberality of the law, by persons improperly evading public duties, is admitted rather because it is highly probable, than because it has been ever proved. Wherever benefits are granted, unfair attempts will be made to obtain a fraudulent participation in them. If

however such practices, instead of being corrected by stricter and more jealous legal measures, are to be used as an argument for giving a new interpretation to an old law, their existence, which is capable of easy demonstration, ought at least to be in the first place clearly established. But the assertion is supported by no evidence: and the fact that the number of persons applying for qualifications to the Quarter Sessions has been for some years on the decline, which appeared from the papers laid before Parliament previously to the introduction of Lord Sidmouth's bill, seems decisively to prove the contrary. And were it otherwise, such frauds would be miserably ineffectual, if practised on the magistrates alone, by qualifying under the Toleration Act: they must go to the length of falsely assuming the complicated character, to which exemption from the militia is by law attached, and establish their claim to such false character to the satisfaction of the supervisors of the militia ballot; and these frauds the magistrates have no peculiar power to detect or defeat, whether their power to administer the oaths be discretionary or ministerial.

Although the Act of Toleration has been seldom discussed in courts of justice, no part of our legal code has more uniformly been regarded with the most favourable eye by the enlightened sages of the law. The distinguished men, whose virtues and abilities have shed so bright a

lustre on the judicial character of England, seem to have rejoiced in every opportunity of bearing testimony to the principles of Toleration, and of enforcing the most liberal interpretation of that important Statute, by which they are secured. Thus, when it became a question before Lord Chief Justice Willes and the Court of Common Pleas, in the year 1744, whether a Baptist Minister, being also engaged in trade, was exempted from serving a parish office created since the time of King William, the judgment was pronounced in the following emphatic and comprehensive terms: "This is an extremely clear case. This case was not reserved from any doubt in the judge who tried the cause, but from the importunity of counsel. The Toleration Act is grounded on natural rights, and the highest natural right is that of the conscience. The Statute ought to receive a large and beneficial exposition, if the case wanted it; but the present is not only within the intent, but also within the very letter of it. Every person who is in Holy Orders, and is a teacher qualified according to the 1st of William and Mary, c. 18. is exempted from serving any parochial office, or other office, in any parish, &c.; the plaintiff is so qualified, and therefore is exempted. This is a parochial office in the nature of it; the Statute 10th George II. calls it an office. It is appointed by the parishioners, and exercised in a parish. The addition of the plaintiff's being a merchant, or dealer in hops, varies

not the case; it does not destroy the privilege, any more than a clergyman's holding a farm, or exercising any temporal office. The Toleration Act exempts teachers from all future offices. Judgment for the plaintiff."*

Again, in the case of Atcheson *v.* Everitt,† where a question incidentally arose on the propriety of indulging the scruples of the Quakers, with respect to swearing, Lord Mansfield took occasion to eulogize the "more liberal way of thinking which prevailed after the Revolution. The principles of Toleration (said his Lordship) were explained and justified, in consequence of the writings of Mr. Locke, Lord Somers, and other great men of those times: and a Statute passed, which, though not general, was very extensive in the relief it afforded to scrupulous consciences. That Statute was 1st William and Mary, commonly called the Toleration Act."

Mr. Justice Foster, in the clear and forcible language for which he was remarkable, declared that "THE ACT OF TOLERATION IS NOT TO BE CONSIDERED MERELY AS AN ACT OF CONNIVANCE AND EXEMPTION FROM FORMER LAWS; IT WAS MADE THAT THE PUBLIC WORSHIP OF THE DISSENTERS MIGHT BE LEGAL; AND THAT THEY MIGHT BE ENTITLED TO THE PUBLIC PROTECTION."‡

* Kenward *v.* Knowles, Willes Rep. 463.

† Cowp. Rep. 389.

‡ Evans *v.* The Chamberlain of London, cited in 2 Burn's Ecclesiastical Law, 5th Ed. p. 190.

It is apprehended, however, that such a construction of the Act, as would place a discretionary power of refusing those who may not be considered by the Magistrates as falling within the Act; a power necessarily involved in the supposed right of hearing and examining evidence on that subject,—would not only withdraw the public protection from that worship of the Dissenters, which the Act was intended to legalize, but would hazard even their exemption from punishment, and change the substantial security of a beneficent law, into a precarious dependence on the arbitrary will of individuals.

But if the preceding observations have any weight in them, this difficult and invidious duty, is not cast by law upon the Magistrates. The letter of the Act of Parliament conveys no such meaning; its spirit is completely against it, and the usage has always been directly the reverse. The practice has been followed by no inconvenience, nor can it either give effect to any frauds, or occasion any abuses. It has been sanctioned by universal opinion, from the moment the Act was passed, during a period of a hundred and twenty years;—claimed as a right, by those who were interested to preserve it; granted as an undeniable privilege, by many who would have been well pleased to refuse it. A departure from it, would be wholly ineffectual, for the correction of the mischiefs supposed to result from it, but a most powerful instrument for the vexation and

oppression [illegible] was designed [illegible] opening for [illegible] the Magistrates, [illegible] of Dissenting Ministers [illegible] secuting laws [illegible] the Second, [illegible] will and pleasure [illegible] Great Charter [illegible] on the same [illegible] cense; and the Toleration Act [illegible] repealed.

FINIS.

Erratum et Addendum.

Page 9, Line 10 from bottom, *for* "Peak's Case" *read* "Peake's Case."

Page 35, after the first paragraph, add the following note:—

Since writing the above, the author has been happy to see his opinions on this point sanctioned and enforced in a very able tract, entitled, "An Enquiry into the original and modern Application of the Statute of the 1st of William and Mary, commonly called the Toleration Act. By the Author of 'Hints on Toleration.' London: Maxwell. 1813."

W. Hoschine, Printer, Dowgate Hill London